LIBRARY
PREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 5 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 380

M/S KLAUS OLDENDORFF, her engines, boilers etc., in rem, and
EGON OLDENDORFF, in personam,
Petitioners

vs.

POTASH IMPORT AND CHEMICAL CO.
Respondent

BRIEF OF POTASH IMPORT AND CHEMICAL CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HARRY E. McCOY
936 Wainwright Building
Norfolk, Virginia 23510
Counsel for Respondent

Of Counsel:
CHARLES R. DALTON, JR.
RICHARD I. GULICK
936 Wainwright Building
Norfolk, Virginia 23510

PRINTED BY TEAGLE & LITTLE, INC., NORFOLK, VA.

INDEX

	Page
QUESTION PRESENTED	2
STATEMENT OF CASE	2
ARGUMENT	5
CONCLUSION	8

CASES CITED

Artemis Maritime Co. v. *Southwestern Sugar & Molasses Co.* (4 Cir., 1951) 189 F.2d 488, 491 7

Continental Insurance Company v. *United States* (2nd Cir., 1952) 195 F.2d 527 ..... 5, 7

Huilever, S.A. Division Huileries Du Congo Belge v. *The Otho* (2 Cir., 1944) 139 F.2d 748 7

Schade v. *National Surety Corporation* (2nd Cir., 1961) 288 F.2d 106 6

RULES

Rule 52(a) F.R.C.P. 6

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 380

M/S KLAUS OLDENDORFF, her engines, boilers etc., in rem, and
EGON OLDENDORFF, in personam,
Petitioners

vs.

POTASH IMPORT AND CHEMICAL CO.
Respondent

BRIEF OF POTASH IMPORT AND CHEMICAL CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Potash Import and Chemical Co., respectfully requests that this Court deny the Petition of M/S KLAUS OLDENDORFF, her engines, boilers etc., in rem, and Egon Oldendorff for issuance of a Writ of Certiorari to review the Opinion and Final Order of the United States Court of Appeals for the Fourth Circuit entered in this matter on March 4, 1969 and April 10, 1970, respectively.

QUESTION PRESENTED

Should District Court's Decision Determinative As To Whether Shipowner Exercised "Due Diligence" In Making His Vessel Seaworthy With Disputed Facts Pertaining Thereto Be Treated On Appeal As A Question Of Fact Or A Question Of Law?

As the respondent differs with petitioners as to the facts pertinent to this Honorable Court's proper consideration of the Question Presented, we set forth hereinafter the material facts revealed from this record. For convenience, simplicity and uniformity, we shall hereinafter refer to Egon Oldendorff as "shipowner" and Potash Import and Chemical Co. as "Potash."

STATEMENT OF CASE

Shipowner is a citizen of the Federal Republic of West Germany and owner of the M/S KLAUS OLDENDORFF. Potash is an American corporation engaged in the importation of potash in bulk. Shipowner contracted with Potash to carry Charterer's cargo from Germany to the United States aboard the M/S KLAUS OLDENDORFF in the Spring of 1966, a part of which shipment was found, upon delivery, to be in a badly damaged condition.

The KLAUS OLDENDORFF was built in 1958, in Bremerhaven, Germany, and at the time of the damage to the cargo in question in 1966, still had in use her original bilge piping, a portion of which was routed through salt water carrying ballast tanks in the number five (5) hold and elsewhere. This bilge piping was manufactured of galvanized steel 3½ inches in diameter, 5 millimeters in thickness and had no check (non-return) valves at the bilge suctions in the holds to insure watertight integrity insofar as potential leaks from that portion of

piping passing through the ballast or deep tanks. Undisputed testimony reflects that the service life of 3½ inch galvanized steel piping 8 millimeters in thickness is seven (7) to ten (10) years, and that similar piping of 5 millimeters in thickness has a proportionately shorter service life.

Prior to the critical voyage, the KLAUS OLDENDORFF underwent certain general maintenance work and reclassification tests in a shipyard in Hamburg, Germany, in late February and early March of 1966. No specific instructions with regard to testing, maintenance or repair of the bilge piping was given by the shipowner. While shipyard employees testified that the bilge lines in each hold of the vessel were separately pressure tested, the wing tanks pressured, and the pipes partially hammer tested; admitttedly no drill testing or ultrasonic testing of the thickness of the bilge piping was made as performed elsewhere in the trade despite the age of the bilge piping in this ship which had exceeded its life expectancy. Near the end of the KLAUS OLDENDORFF's stay in the shipyard, a cargo surveyor, representing Potash, inspected the vessel's holds for cleanliness *solely* and certified them satisfactory in that inspection for loading of a cargo of potash.

On March 17, 1966, the KLAUS OLDENDORFF proceeded from Hamburg to Bremerhaven where she loaded a cargo of potash in accord with the Charter Agreement. This cargo was in good condition upon loading and no exceptions were noted. While heavy seas were encountered on the crossing to the States, they were no more severe than usual for that time of the year, and the Master noted that the vessel had previously "very often encountered heavy and still worse weather." Additionally, no testimony was offered as to the specific wind velocity.

Because there was some damage to attachments of the vessel above deck, upon her arrival at Wilmington, an examination of the cargo was made by a marine cargo surveyor on April 7, 1966. At that time the potash cargo was found to be dry and unloading was commenced. As the KLAUS OLDENDORFF rose in the water it became difficult for the dockside cranes to complete the discharge and ballast was therefore pumped into her ballast tanks to lower the vessel in the water.

Thereafter, on April 12, 1966, salt water contamination was noted to the sulfate of potash in the number five (5) hold and a survey was initiated to ascertain the cause and extent of the damage. As a result of this survey, an egg-shaped hole, approximately 2½ inches by 2 inches in side, was found in the bilge suction line pipe passing through the wing tank outboard the number five (5) hold of the vessel. The metal around the edges of this hole was soft, crumbly and deteriorated to such an extent as to question the very performance of any tests by the German shipyard and the adequacy thereof.

In view of the location of this rupture, it was apparent to all concerned, including the Master and cargo surveyors, that during the process of ballasting, when water in the starboard wing tank reached the level of the hole in the bilge line pipe, it entered the pipe and flowed through into the bilge well and thence into the number five (5) hold thereby damaging the cargo in question.

During the KLAUS OLDENDORFF's transit from Wilmington to Norfolk, crewmembers of the vessel cut out the section of the pipe containing the rupture and put in a new piece of pipe to effect necessary repairs to the bilge line. However, the Master did not see fit to retain the critical section of removed piping

and the same was not available for further inspection, testing and analysis upon the vessel's arrival at Norfolk or subsequently.

Fortunately, however, one of the cargo surveyors at Wilmington did secure small parts of the deteriorated and crumbly, rusted metal from the edges of the hole in the bilge suction line pipe which was offered as an exhibit at the time of the trial (Plaintiff's Exhibit 6 and 7, Tr. 34-36).

Following the discovery of this damaged cargo at Wilmington, the discharging stevedores removed and segregated the contaminated potash which had previously been stored in the number five (5) hold of the KLAUS OLDENDORFF. This portion of the shipment was surveyed, put out on a competitive bid and disposed of in the usual and customary manner. Undisputed testimony reflected that the total loss to the Charterer sustained due to the damaged potash was the sum of $34,860.39. An additional award of $445.71 was allowed for attorneys' fees and expenses due to the shipowner's arbitrary refusal to admit this damage, where ultimately no dispute was raised in connection with the proof thereof.

ARGUMENT

Notwithstanding the assertions of the petitioners to the contrary, the decision of the Fourth Circuit Court of Appeals in the case at bar is *not* in conflict with the decision of the Second Circuit Court of Appeals in the case of *Continental Insurance Company* v. *United States,* (2nd Cir., 1952) 195 F.2d 527, nor the controlling law of the latter Circuit.

The premise is erroneous that the Second Circuit Court of Appeals in *Continental Insurance Company* (Supra) ruled that *every* review on appeal of the issue of "due diligence" incident to a shipowner's obligation to cargo to make his vessel seaworthy before commencement of the voyage raises *solely* a question of law. The effect of such a ruling would be to limit, if not destroy, the very purpose of Rule 52(a) of the Federal Rules of Civil Procedure in many cases such as the one at bar wherein the trial Court's decision necessarily involved determination of disputed facts relating to the very issue of "due diligence."

In *Continental Insurance Company* (Supra), a test was performed to determine the seaworthiness of discharge assemblies incident to the satisfaction of shipowner's duty to use "due diligence" to make its vessel fit at the commencement of a voyage. There was no dispute of fact as to the appropriateness of the test or its performance. Upon review, the Second Circuit Court of Appeals held in that particular case that a review of a finding of "due diligence" involved solely a matter of law.

Thereafter, however, the Second Circuit Court of Appeals, when faced with the same line of argument as asserted by the petitioners herein in the subsequent case of *Schade* v. *National Surety Corporation* (2nd Cir., 1961) 288 F.2d 106, clearly affirmed that "due diligence" does involve a factual issue subject to the "clearly erroneous" doctrine enunciated by Rule 52(a), F.R.C.P. in those cases wherein there are disputed facts as to the appropriateness of tests and the satisfactory performance thereof conducted incident to the shipowner's obligation to make his vessel fit.

In this latter case, the Second Circuit Court of Appeals stated (Page 107):

> "Appellant argues that this holding is reviewable here as a matter of law, relying on Continental Ins. Co. v. United States, 2 Cir., 195 F.2d 257. We disagree. There the court treated as a question of law the question whether a certain test, conceded to have been conducted, constituted 'due diligence.' Here at issue were questions as to what tests were reasonably required and what tests had in fact been made. These were questions of fact, Huilever, S.A. Division Huileries Du Congo Belge v. The Otho, 2 Cir., 139 F.2d 748; Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., 4 Cir., 189 F.2d 488, 491, as to which the findings were not clearly erroneous."

Similarly, in the case at bar, there was conflicting testimony as to the type of test which should have been performed by the shipyard in order to comply with shipowner's "due diligence" obligation, as well as evidence (Plaintiff's Exhibit 6 and 7; Tr. 34-36) of such extensive deterioration and decay in the tested piping so as to likewise place in factual issue the adequacy and propriety of the very performance of such tests by the German shipyard.

Petitioners raised the same legal premise asserted in this Petition for Certiorari in their earlier Petition for Rehearing before the Appellate Court below, and the Fourth Circuit Court of Appeals in this case, as did the Second Circuit Court of Appeals in the Schade case, rejected the fallacious reasoning that a review of shipowner's "due diligence" obligation on appeal involves a matter of law where there is conflict of fact as to the appropriateness of tests and the performance there-

of used to satisfy shipowner's obligation to make his vessel fit at the commencement of voyage.

CONCLUSION

Therefore, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed and respondent prays that the Writ of Certiorari sought herein be denied.

Respectfully submitted,

HARRY E. McCOY
936 Wainwright Building
Norfolk, Virginia 23510
Counsel for Respondent

Of Counsel:
CHARLES R. DALTON, JR., Esquire
RICHARD I. GULICK, Esquire
SEAWELL, McCOY, WINSTON & DALTON
936 Wainwright Building
Norfolk, Virginia 23510